Supreme Court, U.S.
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No. 00-279

IN THE

Supreme Court of the United States

ARCHDIOCESE OF OKLAHOMA CITY; REVEREND CHARLES A. SALATKA; REVERENCE EUSEBIUS J. BELTRAN; and OBLATES OF ST. FRANCIS DE SALES,

Petitioners,

v.

DENNIS W. BALLARD and RONALD BALLARD, individually; and ALGERENE BALLARD, individually; C.J., a minor, by and through his parents and next of friends, JIMMIE BARTLETT JOHNSON, JR. and PAMELA GAYLE JOHNSON; and JIMMIE BARTLETT JOHNSON, JR., individually; and PAMELA GAYLE JOHNSON, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should deny certiorari because the order sought to be reviewed is not a final judgment?

2. Whether the Court should deny certiorari because neither a church organization nor its minister is exempt from tort liability for secular conduct that does not burden the free exercise or establishment clauses of the First Amendment?

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The Respondents respectfully request the Court to deny the Church Petitioners' petition for writ of certiorari. The Oklahoma Supreme Court declined to assume original jurisdiction of this case in an 8-0 decision dated July 10, 2000.

STATEMENT OF THE CASE

A. The Facts.

Respondents sued Father John Doe, the Archdiocese of Oklahoma City ("Archdiocese" herein), Reverend Charles A. Salatka, Reverend Eusebius J. Beltran, Reverend Alfred J. Russell, and the Oblates of St. Francis de Sales[1] ("Oblates" herein) in the state District Court of Oklahoma County, Oklahoma, alleging claims arising from the sexual molestation of Dennis Ballard, a minor at the time of filing, and C.J., a minor, by Father John Doe, in rural Duncan, Oklahoma when the Petitioners knew or should have known of the sordid history of Father John Doe's sexual misconduct. The Respondents' claims against the Petitioners include direct and vicarious liability for intentional and/or reckless infliction of severe emotional distress, failure to warn, failure to report sexual abuse, outrageous conduct, civil conspiracy, breach of fiduciary duty, and for negligent hiring, retention and supervision ("claims" herein) of Father John Doe.

Father John Doe was a member of the Oblates based in Toledo, Ohio. The Oblates are a religious organization which trains, credentials, and ordains Roman Catholic priests. The Oblates contract with other Catholic entities, including Petitioner Archdiocese, for the employment of Oblate Catholic priests. Despite the Oblates' actual knowledge of Father John Doe's history of sexual misconduct with minors, on or about December 1990, the Oblates contracted with the Archdiocese for the employment of Father John Doe as pastor of the Assumption Catholic Church in Duncan, Oklahoma, and the

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1. The Archdiocese of Oklahoma City, Reverend Charles A. Salatka, Reverend Eusebius J. Beltran, and the Oblates of St. Francis de Sales will be collectively referred to herein as the "Petitioners."

Oblates agreed to transfer Father John Doe from the diocese of Joliette, Illinois to Duncan, Oklahoma. Father John Doe sexually molested young boys while a teacher and wrestling coach for Lumen Christi High School located in The Diocese of Lansing, Jackson, Michigan. Father John Doe was served with lawsuits, while carrying out his duties as pastor of the Duncan, Oklahoma church, alleging clergy sexual misconduct naming him and the Oblates as defendants. Petitioner Archbishop Charles Salatka installed Father John Doe to pastor the Duncan, Oklahoma church in December 1990. Father John Doe again continued his long pattern of sexual misconduct with minors and molested Respondent Dennis Ballard for a period of five years from 1992 to 1997 and Respondent C.J., a minor, from 1996 to 1997.

Even though Petitioners had long known of Father John Doe's sexually deviate propensities, it was only after receiving renewed reports about Father John Doe's sexual misconduct that the Archdiocese belatedly notified the Duncan Police Department about the complaints of sexual molestation, and the local police arrested Father John Doe. The District Attorney filed charges against Father John Doe which resulted in the priest pleading *nolo contendere* to two counts of lewd molestation of a minor and was sentenced to the maximum sentence allowed under Oklahoma law.

B. Proceedings Below.

In September 1999, the Respondents filed suit against the Petitioners and Father John Doe in the state District Court of Oklahoma County, Oklahoma, alleging claims arising from the sexual molestation of Dennis Ballard and C.J., a minor, by Father John Doe, in rural Duncan, Oklahoma when the Petitioners knew of the sordid history of Father John Doe's sexual misconduct. The Respondents' claims against the Petitioners include vicarious liability and direct liability for intentional and/or reckless infliction of severe emotional distress, failure to warn, failure to report sexual abuse, outrageous conduct, civil conspiracy, breach of fiduciary duty, and for negligent hiring,

retention and supervision of the Petitioners' priest. (*See* Third Amended Petition of Respondent/Plaintiff C.J. dated January 25, 2000, Petitioners' Appendix D, pp. 14a-22a; and Fourth Amended Petition of Respondent/Plaintiff Dennis Ballard dated January 25, 2000, Petitioners' Appendix C, pp. 5a-13a).

On March 23, 2000, the Petitioners moved to dismiss the Respondents' claims under Oklahoma Statutes 12 O.S. 2012 on the ground that the trial court lacked subject matter jurisdiction under the First Amendment of the United States Constitution, and Article 1, Section Two of the Oklahoma Constitution. (*See* Motions to Dismiss of the Archdiocese filed in each state court case on February 18, 2000, Petitioners' Appendix E, pp. 23a-33a; and Amended Motions to Dismiss of the Oblates, filed in each state court case on March 23, 2000, Petitioners' Appendix F, pp. 34a-55a, and Petitioners' Appendix G, pp. 56a-78a). Respondents filed responses and briefs and the parties agreed to submit the issue to the state court on the briefs.

On May 15, 2000, Oklahoma County District Judge Niles Jackson overruled the Petitioners' motions to dismiss and issued a memorandum Order. (*See* Petitioners' Appendix A, pp. 1a-2a). The Petitioners sought to invoke the original jurisdiction of the Oklahoma Supreme Court through an application to assume original jurisdiction of the cases and a writ of prohibition barring the Oklahoma County District Court from exercising subject matter jurisdiction. (*See* Application to Assume Original Jurisdiction, Petitioners' Appendix L, pp. 120a-125a, and separate Brief in Support, Petitioners' Appendix K, pp. 94a-103a, filed by the Archdiocese on May 22, 2000; Application to Assume Original Jurisdiction, Petitioners' Appendix M, pp. 126a-131a, and separate Brief in Support, Petitioners' Appendix N, pp. 132a-157a filed by the Oblates on May 23, 2000, Supreme Court Case No. 94743; and Application to Assume Original Jurisdiction, Petitioners' Appendix O, pp. 158a-163a, and separate Brief in Support, Petitioners' Appendix P, pp. 164a-167a filed by the Oblates on

May 23, 2000, Supreme Court Case No. 94744). The Petitioners again argued that the trial court lacked subject matter jurisdiction under the First Amendment of the United States Constitution, and Article 1, Section Two of the Oklahoma Constitution. The Respondents argued in their objections essentially that the district court had subject matter jurisdiction of Respondents' tort claims against the Petitioners. On July 10, 2000, the Oklahoma Supreme Court declined to assume original jurisdiction of these cases and denied the Petitioners' Applications to Assume Original Jurisdiction and Petition for Writ of Prohibition (Petitioners' Appendix L, pp. 120a-1251, Petitioners' Appendix M, pp. 126a-131a, and Petitioners' Appendix O, pp. 158a-163a).

Respondents had served discovery requests upon the Petitioners and had sought to take the deposition of the Archbishop Petitioners. (*See* Petitioners' Appendix H, dated January 6, 2000, pp. 79a-84a, Petitioners' Appendix I, dated January 20, 2000, pp. 85a-93a, Petitioners' Appendix J, April 7, 2000, pp. 94a-103a). However, such discovery was stayed by Order of the trial court dated June 1, 2000, pending the decision of the Oklahoma Supreme Court on the Petitioners' Application to Assume Original Jurisdiction and Petition for Writ of Prohibition. Once the Oklahoma Supreme Court declined to assume original jurisdiction, the Respondents again sought to have the discovery requests answered and filed motions to compel. (*See* Petitioners' Appendix P (incorrectly stated as Appendix Q in Petitioner's Table of Contents), dated July 17, 2000, pp. 164a-167a, Petitioners' Appendix R, dated July 17, 2000, pp. 194a-197a, and Petitioners' Appendix S, dated July 17, 2000, pp. 198a-200a). The trial court stayed the proceedings by Order dated August 22, 2000, pending the this Court's decision on the Petitioners' Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE COURT SHOULD DENY CERTIORARI BECAUSE THE ORDER SOUGHT TO BE REVIEWED IS NOT A FINAL JUDGMENT

The July 10, 2000, unanimous Order of the Oklahoma Supreme Court declining to assume original jurisdiction over this case is not a "final judgment" thereby making review of this case premature and improper under 28 U.S.C. § 1257. Although Petitioners sought the Oklahoma Supreme Court's original jurisdiction through an application to assume original jurisdiction and petition for writ of prohibition, Petitioners erroneously argue that this Court should exercise jurisdiction based on the Oklahoma Supreme Court having denied a Petition for Certiorari or Writ of Error and this Court's history of deeming such decisions as a "final judgment for purposes of exercising jurisdiction." (Petitioners' Petition at pp. 6). Petitioners sought no such relief. Further, the authorities Petitioners cite as precedent for this Court to assume jurisdiction are clearly distinguishable and inapplicable to the instant case.[2] This Court

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2. *California v. Trombetta*, 467 U.S. 479, 484 (1984) was a criminal case involving evidentiary issues on whether the state must preserve breathalyzer samples. After the trial court overruled the defendants motions to suppress and a jury trial resulted in the certain Defendants' convictions, the Defendants appealed to the Court of Appeal which ruled in the Defendants' favor, granted them new trials, and ordered that the intoxilyzer results not be admitted as evidence. The State unsuccessfully petitioned for certiorari to the California Supreme Court ultimately seeking certiorari to this Court. This Court reviewed the case primarily under 28 U.S.C. § 1257(3) as comparable to a judgment affirming a suppression order. In *Construction Laborers v. Curry*, 371 U.S. 542, 550 (1963), this Court reviewed a decision by the state supreme court granting a temporary injunction by reversing the trial court's denial of a temporary injunction in a case raising issues under the National Labor Relations Act, 29 U.S.C. § 158(b). In what was clearly a federal pre-emption

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has repeatedly held that its power to review a state court decision is "limited to a final judgment rendered by the highest court of the State in which decision may be had." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-477 (1975). A judgment is final only when nothing "further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). Petitioners cited no authority for pre-final judgment review of a secular tort case involving innocent children injured as a direct result of sexual molestation by the Petitioners' priest when the Petitioners had notice and tolerated such abhorrent behavior and failed to prevent it. None of the cases cited by Petitioners stand for the proposition that a petition for writ of certiorari is under the "final judgment" requirement of 28 U.S.C. § 1257 where the highest court of the state has declined to assume original jurisdiction on application to assume original jurisdiction and petition for writ of prohibition where there has yet to be a trial on the merits. There is no constitutional verbiage which characterizes church sponsored child abuse as a sanctioned religious right, and this Court should refrain from exercising jurisdiction at this stage of the case.

> *In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and*

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case, this Court found that the Georgia court "finally and erroneously assert[ed] its jurisdiction to deal with a controversy which is beyond its power and instead is within the exclusive domain of the National Labor Relations Board." *Curry*, 371 U.S. at 548. In *Western Union Tel. Co. v. Crovo*, 220 U.S. 362, 366 (1911), this Court assumed jurisdiction to decide a constitutional question under the Commerce Clause after a jury trial and appeal on writ of error to the highest court of Virginia.

> *property, and which does not infringe personal rights, is conceded to all.*[3]

This case raises no unique jurisdictional issues which free speech, federal pre-emption, state licensure or commerce clause, free association, or "minimum contacts" cases[4] raise at the outset of litigation which qualify for pre-final judgment review under this Court's test in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Despite Petitioners' allegations to the contrary, this is not simply a negligent retention, hiring and supervision case because Respondents have also alleged that the Petitioners are liable to the Respondents under theories of intentional and/or reckless infliction of severe emotional distress, outrageous conduct, civil conspiracy, failure to warn, failure to report sexual abuse, and breach of fiduciary duty.[5] All torts occurred as a result of Petitioners'

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3. *Watson v. Jones*, 13 Wall. 679, 728 (1871) (emphasis added).

4. Petitioners erroneously cited these classes of cases as justification for this Court to assume jurisdiction under 28 U.S.C. § 1257 and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). However, as this Court is keenly aware, such cases present vital jurisdictional issues at the outset of litigation which may require intervention to protect constitutionally and/or federally protected rights. This Court has consistently held that religious organizations are not "above the law" and are subject to civil litigation in contexts like tort claims thereby precluding this Court from exercising jurisdiction before a "final judgment" could be obtained in the trial court. *See, e.g., Watson v. Jones*, 13 Wall. 679, 728 (1871); *Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594-595 (1940); *Prince v. Massachusetts*, 321 U.S. 158, 166-71 (1944); *United States v. Ballard*, 322 U.S. 78, 86 (1944). This Court has further refused to disturb state appellate court decisions in tort cases against church organizations denying certiorari review. *See, e.g., Moses v. Diocese of Colo.*, 863 P.2d 310 (Colo. 1993), *cert. denied*, 511 U.S. 1137, 114 S. Ct. 2153, 128 L. Ed. 2d 880 (1994); *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996), *cert. denied*, 520 U.S. 1241(1997); *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 654 N.Y.S.2d 791 (1997), *cert. denied*, 520 U.S. 1248 (1997).

5. *See* Petitioners' Appendix C, pp. 5a-13a and Appendix D, pp. 14a-22a.

decision, with knowledge of prior molestations, allowing Father John Doe to be involved in secular conduct which harmed unsuspecting third parties.

The Petitioners apparently seek review of this case under the third *Cox Broadcasting* exception alleging that the "federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting*, 420 U.S. 469, 483 (1975). Such reasoning is misplaced because the Petitioners have a just remedy by direct appeal of any adverse final judgment to the Oklahoma Supreme Court and ultimately this Court in the event that Respondents prevail. Respondents' claims against Petitioners do not seek to invade any of Petitioners' beliefs which are purely religious and involve any sincerely held religious belief. Respondents' claims are not analogous to free speech or press, federal pre-emption, state licensure or commerce clause, free association, and/or "minimum contacts" cases because Respondents' do not seek to restrict Petitioners' religious beliefs, restrict their free exercise of such religious beliefs nor do Respondents seek to force Petitioners to exercise their beliefs in any particular way thereby requiring extraordinary or emergency relief.[6] Respondents' claims of

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6. Petitioners cite *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329-1330 (1975) as authority that allowing Respondents' claims to go forward would "not only chill, but irreparably harm" Petitioners' constitutional rights. *Stuart* was a free speech case wherein the Court found that the restraint on the press was improper due to the nature of the information sought to be released in the press. The issues in *Stuart* did not involve tort claims and attempts to discover evidence to prove such claims. Petitioners further cite *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156, 161 n.4 (1973) as some justification to prevent the Respondents' case from proceeding to resolution in the state courts because the state courts had decided their jurisdiction erroneously. *Snyder's Stores*, a non-tort case, involved an attempt by Snyder's Stores (Cont'd)

sexual molestation are clearly actionable under *Watson* and its progeny and Oklahoma law because they complain of tortious conduct which is outside of any sincerely-held religious belief or doctrine thereby precluding special review. Petitioners' allegation of "constitutional deprivation" running wild by allowing Respondents to discover evidence of Petitioners' knowledge, conspiracy, concealing and cover-up of Father John Doe's abhorrent behavior in order to prove Respondents' case is wholly without merit. The issues in this case relate to the Petitioners' tortious conduct, not their beliefs. Such tortious conduct, if proven, is not protected under the cloak of the First Amendment, and Petitioners have cited no binding authority to justify such protection or the invocation of this Court's jurisdiction under 28 U.S.C. § 1257.

This Court's decision in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) does not warrant review of this case as an exception to the "final judgment" rule of 28 U.S.C. § 1257. The "federal issue is conclusive" of the *Cox Broadcasting Corp.* exceptions to the "final judgment" rule is inapplicable in this case because this Court clearly intended such exception to be utilized in cases where a litigant's recourse is limited at the state level or where the statute at issue on its face conflicts with constitutionally protected freedoms.[7] This Court has never held that religious organizations are above the law and cannot be subjected to state tort laws and the discovery laws necessary

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to obtain licensure to operate a pharmacy which was denied by the state board of pharmacy. Snyder's Stores had no alternative but to seek the intervention of this Court after exhausting its state law remedies.

7. This Court's review of cases under this category includes cases in which freedom of the press and criminal jeopardy are involved. *Mills v. Alabama*, 384 U.S. 214 (1966). In *Mills*, the state sought criminal penalties against a publisher for printing opinions about candidates for election on election day. This Court held that the state court decision was final for purposes of this Court's jurisdiction because of the clear violation of the freedom of the press embodied in the Alabama statute at issue and federal pre-emption of state law .

for litigants to prove such claims. Respondents' claims are not barred by the First Amendment and such claims are not those contemplated by this Court in the "federal issue is conclusive" exception to the "final judgment" rule.

Petitioners' attempts to bring this case under the "federal issue survival regardless of the state court outcome" exception to the "final judgment" rule under *Cox Broadcasting Corp.* are again misplaced because Respondents claims and their right to proceed will only further, not erode, federal policy. Petitioners again rely on cases in which federal pre-emption of state law, free speech, or clearly religious beliefs and uniquely religious practices were at issue.[8] Petitioners fail to cite any authority in which religious organizations facing secular courts on tortious claims and damages have prevailed under purely First Amendment protections because there is not such authority binding on this Court.[9] For this Court to have so held in the past would sanction church sponsored torts such as priestly child

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8. Petitioners erroneously rely upon *N.L.R.B. v. The Catholic Bishop of Chicago*, 440 U.S. 490 (1979) as the foundation for an absolute immunity of church entities from civil discovery and judicial scrutiny. The primary issue in *Catholic Bishop* was whether the National Labor Relations Act applied to union organizing in parochial schools, again a non-church tortious conduct case.

9. Petitioner's cite the following "minimum contacts" cases as authority for this Court's exercise of jurisdiction where no trial on the merits had occurred but where there may be a constitutional bar to jurisdiction. *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Kulko v. California Superior Court*, 436 U.S. 84, 86 (1978); *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). However, all four of these cases are distinguishable because they all involve the critical issue of jurisdiction of a court over a non-resident in which this Court has consistently applied the "minimum contacts" requirement under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In all of these cases, this Court exercised jurisdiction to protect litigants' rights under the Due Process Clause of the Fourteenth Amendment and this Court's prior holdings in *International Shoe Co.*, circumstances unrelated to the instant case.

molestation which this Court has clearly stated are against public policy and not intended to be protected under the First Amendment.[10] Respondents have alleged facts to support non-constitutionally protected claims against the abuser and his employer including tortious actions of a priest acting in the course and scope of his employment in which his employer had notice of such prior deviate sexual behavior and of the priest's propensity to continue such conduct together with his employers' complete failure, despite notice, to take action to prevent such conduct. As this Court has previously recognized, religious organizations are not granted "blanket immunity from suit" under the cloak of the First Amendment.[11] Further, this Court has never held that when "otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation."[12] Moreover, this Court has never held that an individual's religious beliefs excuse him from compliance with laws "prohibiting conduct that the State is free to regulate."[13] Likewise, this Court has

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10. *See e.g., Watson v. Jones*, 13 Wall. 679, 728 (1871); *Prince v. Massachusetts*, 321 U.S. 158, 166-71 (1944); *United States v. Ballard*, 322 U.S. 78, 86 (1944).

11. *United States v. Ballard*, 322 U.S. 78, 86 (1944); *See, e.g., N.H. v. Presbyterian Church*, 1999 OK 88, at paragraph 27, 998 P.2d 592 (Okla. 1999) wherein the Oklahoma Supreme Court carefully limited its intrusion into religious freedom cases.

12. *Emp. Div., Dept. Human Resources of Oregon v. Smith*, 494 U.S. 872, 882 (1990).

13. *Id.* at 879. As this Court stated in *Smith*, "On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition." As described succinctly by Justice Frankfurter in *Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594 -595 (1940):

> Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion

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declined to interfere in state court proceedings simply because religion or religious entities are litigants.[14]

Finally, Petitioners argue under *Cox Broadcasting Corp.* the erroneous allegation that any lower Oklahoma court determination of the non-federal issues of this case could preclude review of the federal issue subsequently on appeal thereby requiring certiorari review qualifying such review under the *Cox Broadcasting Corp.* exceptions to the "final judgment" rule.[15] Petitioners alleged that "adjudicating the

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> or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted).

We first had occasion to assert that principle in *Reynolds v. United States*, 98 U.S. 145 (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said,

> are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

Id. at 166-167. *Smith*, 494 U.S. at 889.

14. *Id.* at 879-889 and the cases collected therein.

15. Petitioners cite *Nat'l Soc. Party of America v. Village of Skokie*, 432 U.S. 43 (1977) as authority for "special attention" this Court gives to First Amendment issues regarding finality of judgment. However, *Village of Skokie* involved a state trial court's injunction blocking the National Socialist Party of America from marching, walking or parading in their uniforms or otherwise displaying the swastika, and from distributing pamphlets or displaying materials inciting or promoting hatred against Jews or persons of any faith, ancestry or race, the state highest court's denial of the group's motion for leave for an expedited

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proper scope of First Amendment protections as a 'federal policy' merits the application to the exception of the general 'finality' rule."[16] However, this Court's analysis in such cases involves a First Amendment challenge to the facial validity of a law or statute including criminal prosecution laws involving freedom of the press and the possession of certain types of printed matter.[17] Such review also involves cases where the facial validity of a law or statute which may infringe on the freedom of the press where such statutes create an affirmative duty to print and disseminate certain printed matter.[18]

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appeal, and this Court's finding that such denial of appellate review was in effect a "final judgment." This Court found that it involved "a right 'separable from and collateral to' the merits (citations omitted)." *Id.* at 44. To deny petitioners review would effectively deny them their right of assembly during the trial and appellate phase of the case. In the instant case, this Court's denial of review would not prevent Petitioners from exercising their religious beliefs in any manner. Petitioners responses to Respondents' discovery, the conduct of litigation, and ultimate disposition will not interfere in the Petitioners' purely ecclesiastical matters. Respondents do not seek to impose their religious beliefs or practices on Petitioners. Respondents simply seek the truth as to why Petitioners allowed their priest's abhorrent conduct to be visited upon them.

16. Petitioners' Petition at pp. 13 (*citing Ft. Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989)).

17. *Ft. Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 57 (1989). In this case, this Court assumed jurisdiction without a final judgment under the *Cox Broadcasting Corp.* fourth exception stating the such review, "[i]nvolves a First Amendment challenge to the facial validity of the Indiana RICO statute. . . ." No such statute or law is at issue in the instant case. Moreover, tort claims against religious entities do not create a challenge under the First Amendment to the facial validity of such laws absent clear evidence of impingement on religious beliefs. Respondents have created no such impingement.

18. Petitioners incorrectly rely upon *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 418 (1973) as standing for the proposition that

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II.

THE COURT SHOULD DENY CERTIORARI BECAUSE NEITHER A CHURCH ORGANIZATION NOR ITS MINISTER IS EXEMPT FROM TORT LIABILITY FOR SECULAR TORTIOUS CONDUCT THAT DOES NOT BURDEN THE FREE EXERCISE OR ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT

A. Church Organizations and Ministers are not immune from tort liability.

The First Amendment does not bar claims for the tortious conduct of church organizations and their ministers for direct and vicarious liability. Courts have consistently held that church organizations and members of the clergy cannot, in *all* circumstances, use the shield of the First Amendment as protection and as a basis for immunity from a civil tort law suit.[19] The Petitioners' remedy in the event of an adverse judgment on the Respondents' secular claims is by direct appeal to the Oklahoma Supreme Court and such remedy is not manifestly unjust or inadequate.

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mere involvement with First Amendment issues would create an "uneasy and unsettled constitution of posture could only harm the operation of a free press" (Petitioners Petition at pp. 13). *Tornillo* involved a Florida statute which on its face required a newspaper to affirmatively print replies to editorials critical of a person's candidacy for public office. This was an injunction and declaratory judgment case which this Court reviewed without a full trial on the merits. This Court reversed the Florida Supreme Court's ruling upholding the validity of the mandatory reply finding that the statute was invalid on its face. Petitioners have demonstrated no such facial invalidity of any law or statute in the instant case.

19. *See* note 22, *infra* and the cases cited therein. *See also N.H. v. Presbyterian Church*, 1999 OK 88, at paragraph 27, 998 P.2d 592 (Okla. 1999); *Destafan v. Grabrian*, 763 P.2d 275 (Colo. 1988) and *Erickson v. Christenson*, 781 P.2d 383 (Or. App. 1989) (Church directly liable for failure to properly supervise Priest in both cases).

Constitutional protection of religious beliefs does not shield a religious institution from all tort liability.[20] Despite the erroneous conclusions reached by Petitioners, this Court has recognized that actions and conduct in the context of religious freedoms ***cannot*** be absolutely protected.

> *The First Amendment has a dual aspect. It not only "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship" but also "safeguards the free exercise of the chosen form of religion." Cantwell v. State of Connecticut, 310 U.S. 296, 303 (1940). "Thus the Amendment embraces two concepts, — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Id. at 304. (emphasis added).*[21]

While the Respondents agree that this Court has previously recognized that the secular courts shall not interfere with purely ecclesiastical matters, this Court has also refused to recognize an absolute bar to claims where religion is involved.[22] The sexual molestation of a child by a Catholic priest certainly rises to the level of the "gravest [of] abuses, endangering paramount interests, [to] give occasion for permissible limitation" on religious freedom.[23]

This Court has long held that conduct is not the "exercise of religion" unless such conduct is mandated by a sincerely

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20. *Bladen v. First Presbyterian Church*, 1993 OK 105 (Okla. 1993) at paragraph 12.

21. *United States v. Ballard*, 322 U.S. 78, 86 (1944); *See also Minersville v. Gobitis*, 310 U.S. 586, 594-95 (1940); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Nutt v. Norwich Roman Catholic Diocese*, 921 F. Supp. 66, 73 (D. Conn. 1995).

22. *See, e.g., Watson v. Jones*, 13 Wall. 679, 728 (1871); *Prince v. Massachusetts*, 321 U.S. 158, 166-71 (1944); *United States v. Ballard*, 322 U.S. 78, 86 (1944).

23. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

held religious belief.[24] The Petitioners have wholly failed to establish that any of Respondents' claims arise from the conduct of any *sincerely-held* religious belief or practice and have further failed to establish any burden upon any *sincerely-held* fundamental-law right or religious belief or practice. Despite Petitioners' allegations to the contrary, there exists no constitutional or ecclesiastical privilege involved in the protection of our children from the evil of sexual offenders cloaked in the robes of the church.[25] Moreover, the party

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24. *Frazee v. Employment Security Dep't*, 489 U.S. 829, 834 (1989). (To prove violation of free exercise clause, litigant must show that burdened conduct "was based on a sincerely held religious belief"); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) (Law does not burden free exercise rights unless it has a "tendency to coerce (the priest or church official) into acting contrary to their religious beliefs"); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987) (Burdened conduct must be "mandated by religious belief" to be protected by free exercise clause) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 717-718 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("to have protection of the Religion Clauses, claims must be rooted in religious beliefs"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

25. Petitioners cite the following non-binding cases for the erroneous proposition that, "A religious organization has immunity from civil discovery and judicial scrutiny regarding placement of clergy." [Petitioners' Brief at pp. 9] *First United Church v. White*, 571 A.2d 790, 792 (D.C. App. 1990) involved a denial of a ministers' claims for employment benefits against the church after his ecclesiastical endorsement was withdrawn based on the church's internal governance mechanisms. The court in *White* refused to review the church's decisions because it deemed the affirmative acts of the church representatives to be matters of church government and the exercise of its decision making in ecclesiastical disputes. However, the court did recognize certain "limited exceptions" to a civil court's jurisdiction of church matters and refused to find any absolute "immunity" from civil discovery and judicial scrutiny regarding the placement of clergy or clerical torts. In *Rayburn v. General Conf. Of Seventh-Day Adventists*, 772 F.2d 1164,

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claiming a constitutional violation has the burden of proving that violation. This Court has resolved the issue of the state's compelling interest to protect children versus any burden on the separation of church and state in favor of the protection of children.[26] Under all of this Court's well-established freedom of religion precedents, the First Amendment provides no defense to tort liability unless the specific tortious acts were actually "mandated by religious belief."[27] Petitioners have the burden of proving that tortious conduct and religious belief are "inseparable and interdependent."[28] This Court's refusal to grant certiorari will adhere to this Court's balancing test of the state's interest in protecting the children and their welfare against church sanctioned sexual abuse cloaked in freedom of religion defenses.

No sincerely-held religious beliefs either mandated or prohibited the specific tortious acts of Petitioners or Father John Doe. There is no religious mandate about keeping secret Father John Doe's sexual abuse of Respondents. There is no mandate or prohibition about deceiving and manipulating vulnerable parishioners. Petitioners have the burden to present free exercise and/or establishment defensive evidence at trial that the tortious conduct and religious belief are interdependent.[29] Whether the

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1171 (4th Cir. 1985) cited by Petitioners, the Court stated that, "[o]f course churches are not — and should not be — above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts." *Rayburn* was a case brought by a woman seeking a pastoral position in which she alleged sexual and racial discrimination against the church entity. The court refused to examine the hiring criteria of the church based on First Amendment grounds. *Rayburn* did not involve tort claims raised against the church entity.

26. *Prince v. Massachusetts*, 321 U.S. 158, 166-71 (1944).

27. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987).

28. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

29. *Id.*

beliefs are sincerely-held religious beliefs is a legal question to be determined at trial.[30] Any claim that the tortious conduct is "religiously motivated" fails to meet the interdependence burden.

The First Amendment provides protection for religious beliefs, but only limited protection is afforded to acts, even acts caused by or resulting from those beliefs. Acts which are in violation of proper laws protecting society are subject to regulation and review even if prompted by religious beliefs.[31] In the instant case, no one claims that a priest's sexual contact with a minor is an act motivated by religious belief. Nor can the prevention of child abuse be characterized as anything but a secular concern. Such conduct is an abomination against state law, human decency, and is not entitled to constitutional protection.

A review of all of the cases cited by Petitioners does nothing to refute the proposition that this dispute is purely secular and not involving matters of religious belief or practice which would result in any entanglement with religious freedoms. The Petitioners have further misrepresented the law to this Court by cleverly omitting the key words, "church property," at the ellipsis in their citation to this Court's decision in *Presbyterian Church v. Hull Church*, 440, 449 (1969) on page 14 of their petition.[32] As this Court is keenly aware, *Presbyterian Church* was a church property dispute case and not a church related tort case. There is a long line of cases involving hierarchical churches in which this Court has consistently left church property disputes to be decided in

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30. *United States v. Seeger*, 380 U.S. 163 (1965).

31. *Watson v. Jones*, 13 Wall. 679, 728 (1871); *Intercommunity Center for Justice and Peace v. INS*, 910 F.2d 42, 44 (2nd Cir. - Md, 1990); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

32. Petitioners incorrectly cited this case in their petition. The proper citation is *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969).

the ecclesiastical arena.[33] Moreover, Petitioners' citations on page 14 of their petition erroneously attempt to draw the conclusion that secular courts have absolutely no role in cases involving clergymen. Such conclusion is simply untrue and disingenuous.

This Court went so far in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952), to note that, "[f]reedom to select the clergy, *where no improper methods of choice are proven*, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." (Italics added). Respondents submit that placing a priest with a sordid history of deviate sexual behavior in charge of a parish with children raises, at a minimum, issues of possible improper methods of choice, retention and/or supervision utilized by Petitioners' church officials.

Further, Petitioners have simply misconstrued and misunderstood this Courts' prior decisions as being an imagined "absolute bar" to secular court regulation of some church related torts.[34] This Court has never sanctioned such

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33. *See, e.g., Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727-729 (1871) (Dispute as to ownership of church property), *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929) (Whether the petitioner is legally entitled to be appointed the chaplain, and whether he shall recover the surplus income accrued during the vacancy), *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 113-115, 120-121 (1952) (Action brought in a state to determine the right to the use and occupancy of a church), later opinion, *Kresshik v. St. Nicholas Cathedral of the Russian Orthodox Church*, 363 U.S. 190 (1960) (Certiorari was granted to review dispute regarding property rights conferred under canon law to use and occupy church), and *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 (1976) (Dispute over control of diocesan property and assets).

34. Petitioners repeated misconstruction and attempt to draw a bright line demarcation between secular cases and cases which have

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a position. The Oklahoma Supreme Court has followed this Court's decisions on the issue of church related torts, specifically reserving for the proper case the question of church related sexual abuse in instances where church officials' knowledge of the abuse is alleged and ultimately proven.[35]

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any relation to churches and/or religion is misplaced. On page 14 of their Petition, Petitioners cite *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727-729 (1871) (Dispute as to ownership of church property); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929) (Whether the petitioner is legally entitled to be appointed the chaplain, and whether he shall recover the surplus income accrued during the vacancy); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 113-115, 120-121 (1952) (Action brought in a state to determine the right to the use and occupancy of a church); *later opinion*, *Kresshik v. St. Nicholas Cathedral of the Russian Orthodox Church*, 363 U.S. 190 (1960) (Certiorari was granted to review dispute regarding property rights conferred under canon law to use and occupy church), and *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 (1976) (Dispute over control of control of diocesan property and assets) as apparent precedent that "civil courts must accept as conclusive the decisions of highest ecclesiastical judicatories of a hierarchical church in religious matters concerning clergymen." (Petitioners' Petition at pp. 14). All of these cases involved, in either a direct or indirect manner, church property disputes in hierarchical churches which all have internal governance rules and courts for the internal adjudication of disputes as to property ownership. None of these cases involved tortious sexual acts of clergy committed against children of the church or superior inaction when faced with notice of the cleric's history such abhorrent behavior. While these cases are instructive in that they all note certain limitations on secular courts in certain purely ecclesiastical cases, these cases are not dispositive of Respondent's claims.

35. Petitioners again seek to divert attention from the instant case of church related torts where church officials' notice of the abuse is evident by citing general ecclesiastical language from several Oklahoma Supreme Court cases. *Bladen v. Presbyterian Church of Sallisaw*, 857 P.2d 789 (Okla. 1993); *Guinn v. Church of*

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Mere assertion that a law burdens some practices that might conceivably be religious has never sufficed to show a violation of the free exercise clause. The party asserting such a defense has the burden to show with record evidence that his or her conduct is mandated by a sincere religious belief.[36] The Free Exercise Clause of the First Amendment does not grant churches or church organizations immunity from being sued in civil courts.[37]

B. Facially neutral laws require no compelling state interest First Amendment analysis.

The torts at issue in this case are neutral laws of general applicability, both on their face and in their application.[38] It is not the status of "priest" that creates the duty, it is the act of the person in a position of superiority offering help to a person who is vulnerable such that the person in the position of superiority assumes a duty to act in good faith. An identical

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Christ of Collinsville, 775 P.2d 766 (Okla. 1989); *Hadnot v. Shaw*, 826 P.2d 978 (Okla. 1992); and *N.H. v. Presbyterian Church, (U.S.A.)*, 99 OK 88, 998 P.2d 592 (Okla. 1999) all involved church matters but lacked the unique facts of the instant case where, like Respondents herein, there were allegations of tortious acts, a long history of the priest's sexual misconduct, the church officials' knowledge of such history of sexual misconduct, and their failure to warn and attempt to prevent it. Respondents conceded that there are areas where ecclesiastical matters are outside the jurisdiction of secular courts. However, the instant case is simply not one of those cases.

36. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

37. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986). Assuming that the Petitioners were able to establish religious motivation, the Free Exercise Clause would not bar the Oklahoma Court from enforcing generally applicable neutral rules that prohibit or burden even religiously motivated conduct. *See Employment Div. Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990).

38. *Id.*

result would have been reached in this case if the Church had been a non-religious employer, such as a day care center or a hospice, whose dangerous employee provided damaging care or counseling to a vulnerable person. None of the Respondents' claims were predicated on actions motivated by religious belief. The Respondents' negligence claims are based on prior notice to Petitioners of the dangers Father John Doe posed. The Respondents' fiduciary duty claims are based, not on how Father John Doe was treated, but on how the Respondents were treated by entities that sought and then betrayed their trust. The Respondents outrageous conduct claims are based on damaging actions taken by Petitioners and/or Father John Doe with full knowledge of the vulnerability of the Respondents.

Further, the neutral common law tort of breach of fiduciary duty imposes upon the Petitioners, who occupied a position of superiority, a duty to act in good faith outside of any religious belief. Breach of this duty imposes civil liability upon the Petitioners.[39] The "status" of the clergyman is not clergy/non-clergy but is simply a person in authority who seeks a special trust that another has the right to rely on the fiduciary.

Moreover, this Court is well schooled in the proper analytical test for determining whether to invoke certiorari jurisdiction in First Amendment free exercise cases. Any conceivable burden on the free exercise of religion as argued by the Petitioners is outweighed by the compelling state interest in preventing the sexual abuse of children and ensuring the compliance with state reporting laws[40] designed to reveal the existence of such abuse together with a citizen's right to the open courts of Oklahoma[41] to seek redress, thereby making assumption of jurisdiction by this Court in this case inappropriate. It is incredible that Petitioners

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39. *See, e.g., Moses v. Diocese of Colo.*, 863 P.2d 310 (Colo. 1993), *cert. denied*, 511 U.S. 1137 (1994).

40. 21 O.S. § 846.

41. Ok. Const. Art. 2, § 6.

actually argue that a jury will be asked to use a "reasonable bishop" standard in determining whether the offender in the instant case was properly supervised. The better reasoned analysis is whether church officials in the instant case exercised ordinary care in determining whether Father John Doe, a priest with a sordid history of sexually deviate behavior, should be entrusted in the fiduciary capacity as pastor in charge of a parish. Retaining the priest and placing him in a position giving him intimate access to young children in a counseling setting, when the Petitioners had direct knowledge that the priest's history placed those children at risk, is void of any sincerely held religious belief. The same analysis would apply if the Petitioners had allowed Father John Doe to drive buses filled with parishioners in situations where the Church knew that the priest had a history of driving carelessly. Petitioners' decisions to allow clergy involved in secular conduct to harm unsuspecting third parties is not protected.

The holding of the Oklahoma Supreme Court is consistent with every decision of this Court. It presents no unsettled or important questions of federal law therefore requiring that this Court deny Petitioners' petition.

C. Religious practice may be burdened to protect society.

Recently, this Court reaffirmed its rule that religious practice may be burdened in certain cases.

> *[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.*[42] *Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to*

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42. Citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).

> *satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.*[43]

This Court's recent decisions demonstrate that one need not reach the compelling state interest test as advanced by Petitioners if the law is neutral and of general applicability.[44] Moreover, mere civil liability exposure, where it is equally and neutrally applied, does not make a law, be it statutory or common law, invalid even though it may touch religion. Petitioners do not argue that the potential liability they face for their priest's actions is not facially or otherwise neutral. Petitioners attempt to argue that "subtle departures from neutrality" justify this Court to grant relief on the basis that their religious beliefs will be "covertly suppressed."[45] Petitioners and their conduct, or lack

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43. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531-532 (1993).

44. *See, e.g. Fowler v. Rhode Island*, 345 U.S. 67 (1953) (Municipal ordinance applied in an unconstitutional manner when used to prohibit preaching in a public park by Jehovah's Witness but to permit preaching at Catholic mass or Protestant service), *Larson v. Valente*, 456 U.S. 228 (1982) (State statute that treated some religious denominations more favorably than others was deemed to violate the Establishment Clause). These cases were not of general application and not neutral to all religious beliefs.

45. Petitioners' petition at pp. 18. Petitioners don't actually make any type of direct "covert suppression" argument deciding instead to cloak their arguments in terms of "reasonable bishop" and allegations that adverse results in cases like those of Respondents will "chill" the exercise of religion. This Court has consistently held that,

> The First Amendment's guarantee that "Congress shall make no law . . . prohibiting the free exercise" of religion holds an important place in our scheme of ordered liberty, but the Court has steadfastly maintained that claims of religious conviction do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the Government. Not all burdens on religion are unconstitutional.

Bowen v. Roy, 476 U.S. 693, 702 (1986).

thereof, are not "targeted" but are simply being scrutinized as any citizen would be under the same or similar circumstances. The object of the torts of negligence and breach of fiduciary duty is to provide compensation to plaintiffs injured by the tortious conduct of another. The torts are religion neutral and, even assuming the conduct at issue had been tied to religious belief, the First Amendment would be no defense pursuant to this Court's holding in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). No one in our society may simply sit back, accept an apology (Petitioners call it "grace"), continually return the "fox to the henhouse," and not expect there to be damage and loss due to their own naivete. This Court should not accept such position because to so hold places our society's children at risk.[46]

Citizens and those in authority, be they religious or agnostic, are held to the same standards in our ordered society, when placed on notice of prior bad acts committed against children, to act to protect children from foreseeable harm. The founding fathers separated church from state but failed to elevate church over state recognizing that such elevation would violate our beliefs in equality for all under law. This Court's holdings set forth in this response clearly illustrate that there are guiding principles available to courts to use in determining whether clergy misconduct cases are constitutionally protected. The Oklahoma Supreme Court has reviewed and followed this Court's rulings in deciding several First Amendment cases and expressly reserving the very issues at bar in this case for a case like Respondents to set forth the appropriate standards for cases in Oklahoma consistent with this Court's precedents.[47]

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46. Petitioners Biblical references at pp. 19 and 20 of their Petition do not alter the fact that this Court has historically limited the rights of a "person to fix unilaterally the conditions and terms of dealings with the Government. Not all burdens on religion are unconstitutional." *Bowen v. Roy*, 476 U.S. 693, 702 (1986).

47. *Bladen v. Presbyterian Church of* Sallisaw, 857 P.2d 789 (Okla. 1993); *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766

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D. Total separation between church and state is not possible.

Total separation between church and state is not possible in our society in an absolute sense and some governmental involvement is inevitable.[48] The line of separation is not absolute but "is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship."[49] Although the *Lemon* case involved the issue of state support to church-related elementary and secondary schools, this Court recognized that absolute abstention from state involvement with church-related entities does not necessarily violate the Establishment Clause of the First Amendment.

This Court has denied review in recent similar cases where there are allegations of sexual misconduct between a minister and the laity, and this Court has refused to allow protection of such ministers under any reasonable construction of the First Amendment.[50] Respondents submit that increased supervision

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(Okla. 1989); *Hadnot v. Shaw*, 826 P.2d 978 (Okla. 1992); and *N.H. v. Presbyterian Church, (U.S.A.)*, 99 OK 88, 998 P.2d 592 (Okla. 1999). Petitioners surely do not suggest that the Oklahoma Supreme Court is a court of rogues set out to emasculate the First Amendment. In all of these cases, the Oklahoma Supreme Court has carefully analyzed the Constitution, its history, guiding rules from this Court, and its own precedents in deciding past First Amendment cases. Petitioners fear of potential financial liability does not justify intervention of this Court without more.

48. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) *citing Zorach v. Clauson*, 343 U.S. 306, 312 (1952) and *Sherbert v. Verner*, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting).

49. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

50. *Moses v. Diocese of Colo.*, 863 P.2d 310 (Colo. 1993), *cert. denied*, 511 U.S. 1137, 114 S. Ct. 2135, 128 L. Ed. 2d 880 (1994); *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996), *cert. denied*, 520 U.S. 1241; *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 654 N.Y.S.2d 791 (1997), *cert. denied*, 520 U.S. 1248 (1997).

of Father John Doe or the termination of his employment by Petitioners prior to his molestation of Respondents would not have violated any religious doctrine nor inhibited any religious practice.[51] Further, religious entities have some duty to prevent injuries inflicted by persons in their employ whom they have reason to believe will engage in injurious conduct.[52] Simply, this Court has been asked to review these matters in the past and has declined to do so. Respondents submit that Petitioners fail to make an adequate case for revisiting these issues again.

Further, the Respondents' claims are purely secular in that subsequent to actual knowledge of a past history and treatment for ephebophilia, a contract for employment between the Petitioners was created, Respondents were sexually molested during this period during the offending Priest's employment with Petitioners, Petitioners tolerated such abuse, and failed to act to disclose such abuse, ultimately failing to prevent it. During this period of time, Father John Doe was sued in a Michigan state court for essentially the same claims of sexual molestation of children as in the instant case.

While courts have held that the Code of Canon Law is admissible to establish the duty of obedience of the Priest to the Bishop, the scope of the relationship between the Bishop and the Priest is relevant to the essence of whether the Diocese negligently supervised the Priest.[53] It is not necessary for the

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51. *See, e.g., Jimmy Swaggart Ministeries v. Board of Equalization of Cal.*, 493 U.S. 378 (1990) (*Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 654 N.Y.S.2d 791, 796 (1997), *cert. denied*, 520 U.S. 1248, 118 S. Ct. 413, 139 L. Ed. 2d 316 (1997).

52. *See, e.g., Konkle v. Henson*, 672 N.E.2d 450, 456 (Ind. App.); *L.L.N. v. Clauder*, 203 Wis.2d 570, 552 N.W.2d 879 (1997); *Erickson v. Christenson*, 99 Or. App. 104, 109, 781 P.2d 383, 386-387 (1989); *Gallas v. Greek Orthodox Diocese of N. & S. Am.*, 154 Misc.2d 494, 499-500, 587 N.Y.S.2d 82 (1991); *Jones v. Trane*, 153 Misc.2d 822, 830-831, 591 N.Y.S.2d 927 (1992).

53. *Stevens v. Roman Catholic Bishop of Fresno*, 49 Cal. App. 3d 877, 123 Cal. Rptr. 171 (1975).

Respondents to solely rely on this position because the contract between the Petitioners is secular and not ecclesiastical. Although the Petitioners may rely upon Canon Law on a Bishop's duty in selecting a Priest, once the Bishop has selected the Priest, a contract is created to determine the work to be done, the individual to be assigned to a position, and the financial arrangements for his employment. When the Priest is incardinated, the civil courts are not expected to limit the church's choice of a religious representative and the Respondents have not asked the Court to so act. Such a request would potentially impinge on the church's constitutional protections. However, the courts recognize that the contract created is secular and can be enforced.[54]

E. Foreseeable risk of harm to society in the selection, supervision, and retention of clerics based on prior notice of a cleric's deviate sexual behavior mandates secular liability.

The Respondents contend that, where there is foreseeable risk of harm to others in selecting a new Priest with known sexual misconduct, and when the church officials fail to warn the public or adequately supervise such Priest's activities in order to reduce the risk of such harm, such lack of action does not merit constitutional protection. In *Kennedy v. Roman Catholic Diocese of Burlington*,[55] a female parishioner brought a tort action against the Diocese and the parish priest alleging the priest had sexually abused her. The Diocese moved for Summary Judgment. The court held, *inter alia*, that the "fact that diocese controlled some activities of its priests, did not, of itself, impose a legal duty to protect a parishioner from sexual abuse by a priest *absent some sort of notice that priest might engage in sexual abuse of a parishioner.* (Emphasis added).

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54. *United Methodist Church v. White*, 571 A.2d 790, 796 (D.C. App. 1990).

55. 921 F. Supp. 231, 234 (D. Vermont, 1996).

> **However, foreseeability of risk remains a key consideration.** The fact that the Diocese may control some activities of a priest, does not in itself, impose a legal duty to protect the Plaintiff, *absent some sort of notice that Father Wysolmerski might engage in the volitional criminal acts at issue.*[56] (emphasis added)

Although the Plaintiff did not prevail in *Kennedy*, the court stated, as did the Oklahoma Supreme Court substantially in *N.H. v. Presbyterian Church*[57], that:

> [I]f hiring was done with knowledge that a prospective employee had perverted sexual proclivities, the institution might well be held accountable.[58]

Respondents submit that their claims are not barred by any reasonable construction of any First Amendment provision.

No amount of constitutional verbiage can characterize church sponsored child abuse as a sanctioned religious right. Priest sexual misconduct with minor children is not part of church doctrine or belief but is part of the secular arena and therefore not barred by any constitutional protections of religion. Had the Petitioners acted with ordinary care in acting upon the knowledge of the Priest's history of criminal and immoral tortious activity, such questions would not be before the Court. The Respondents have not pled any "reasonable Bishop standard" but seek solely to require those persons in authority and their subordinates in any religious organization to act with ordinary care. The Priest in this case was paid by the Petitioner

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56. *See Rivers v. State*, 133 Vt. 11, 14, 328 A.2d 398, 400 (1974); *see also* Restatement (Second) Torts § 317 (B) (ii), "A master is under a duty to exercise reasonable care so to control his servant if he knows, or should know, of a necessity and opportunity for exercising such control."

57. 1999 OK 88, at paragraph 27, 998 P.2d 592 (Okla. 1999).

58. *Kennedy v. Roman Catholic Diocese of Burlington*, 921 F. Supp. 231, 234 (D. Vermont, 1996).

Diocese as an employee, a secular act, to work in the everyday world with it's parishioners. The issue here is whether all Petitioners acted with ordinary care in responding to the widespread information within and outside of the religious community that Priest John Doe had and was sexually molesting minor children. A jury should be allowed to review such claims to determine if Petitioners are liable for such actions and/or inactions. This Court should therefore decline to assume original jurisdiction of this case and allow the Respondents to have their day in Court.

CONCLUSION

Wherefore, above premises considered, Respondents respectfully request this Court to decline to assume jurisdiction in this case and deny Petitioners Petition for Writ of Certiorari.

Respectfully submitted,

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